Supreme Court, U.S.
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No. 95- 95-825 NOV 27 1995

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

RONALD GROGAN,

Petitioner,

vs.

LORELEI A. TAYLOR, d/b/a
ROCKY MOUNTAIN PLATEAU

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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November 22, 1995

QUESTION PRESENTED

In a civil case involving a defense of the applicable statute of limitations was RONALD GROGAN deprived of his right to be represented by counsel and to a fundamentally fair trial by virtue of the trial court permitting both of his attorneys to be called as witnesses against him by the defendant, especially where the trial court had already determined that the attorneys' testimony would be adverse to RONALD GROGAN?

LIST OF PARTIES

The parties to the proceedings before the Colorado Supreme Court and the Colorado Court of Appeals were RONALD GROGAN as the Petitioner, LORELEI A. TAYLOR, d/b/a ROCKY MOUNTAIN PLATEAU as the Respondent, and the STATE OF COLORADO. The STATE OF COLORADO was a Plaintiff in the trial court, however, Petitioner believes that the STATE OF COLORADO no longer has an interest in the outcome of this case and for that reason, it is not named as a party in the Petition for Certiorari.

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Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment and opinion of the Colorado Supreme Court in this case.

OPINIONS BELOW

The opinion of the Colorado Supreme Court has not yet been released for official publication but is included at the Appendix at App. 1a-14a. The Colorado Supreme Court's Order denying rehearing in included in the Appendix at App. 15a-16a. The opinion of the Colorado Court of Appeals is reported at Grogan v. Taylor, 877 P.2d 1374 (Colo. App. 1993) and is included in the Appendix at App. 17a-35a.

JURISDICTION

The Opinion and judgment of the Colorado Supreme Court was entered on June 30, 1995. A timely Petition for Rehearing was denied on August 28, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5 to the United States Constitution states in part: "No person shall . . . be deprived of life, liberty or property without due process of law . . ."

Amendment 14 of the United States Constitution states in part: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United State; nor shall any state deprive any person of life liberty or property without due process of law."

STATEMENT OF THE CASE

This case presents important issues concerning a constitutional right to a fundamentally fair trial for a civil litigant. It also presents issues involving the adverse impact on that right when a party's only two attorneys are called by the opposing party as the opposing party's witnesses in a setting where the trial court had previously determined that their testimony would be adverse to that party, their client.

This appeal arises from the Colorado Supreme Court's affirmance of a jury verdict against RONALD GROGAN, (hereinafter "GROGAN"), in a civil action brought by him against LORELEI A. TAYLOR, d/b/a ROCKY MOUNTAIN PLATEAU, (hereinafter "TAYLOR"), who operated a retail propane outlet. On November 6, 1986, GROGAN had the gasoline and propane tanks on his motor home filled at a gas station owned by TAYLOR. Later that night, GROGAN awoke from sleeping in the motor home and lit a cigarette. The motor

home exploded into flames and he was seriously injured. In late January, 1987, GROGAN retained attorney Ronald Peterson to investigate claims he might have. Mr. Peterson requested Patrick LeHouillier to be co-counsel. Ultimately, suit was filed on March 6, 1991 in the District Court of Gunnison County, Colorado. In her Answer, the defendant TAYLOR asserted the affirmative defense of the statute of limitations. In the discovery portion of the case, TAYLOR sought to depose both of GROGAN's counsel regarding the statute of limitations issue. The trial court, over objection, permitted both counsel to be deposed. The trial was bifurcated and the statute of limitations issue was tried first and over GROGAN's objection, TAYLOR was permitted to call both of GROGAN's attorneys as defense witnesses. Both attorneys remained as counsel throughout the proceedings at trial.

The jury found that the plaintiff's cause of action had accrued on January 21, 1987, the approximate date when he had retained attorney Ronald Peterson. Applying a two year statute of limitations, the trial court determined that the plaintiff's claims were time barred and dismissed his complaint entering judgment in favor of the defendant TAYLOR. The Colorado Court of Appeals reversed the decision of the trial court, finding, inter alia, that the subpoena served upon both attorneys was the functional equivalent of a motion to disqualify, which was never acted upon or ruled upon by the trial court. The trial court had already made a finding that the attorneys' testimony would be adverse to their client. The Court of Appeals ultimately concluded that the trial court erred in not disqualifying GROGAN's attorneys once it became apparent that they would be called upon to testify against him. The Court of Appeals went on to hold that the failure to disqualify GROGAN's attorneys severely prejudiced him and resulted in a trial that was fundamentally unfair to him.

The Colorado Supreme Court granted Certiorari to review the following issues:

> 1. Whether in determining an issue within the exclusive jurisdiction of the Supreme Court, the Court of Appeals erred in ordering a new trial where the conflict of the plaintiff's counsel acting as both witnesses and advocates came about as a result of the conduct of those attorneys.

2. Whether the Court of Appeals erred in ruling that under Colorado Rules of Professional Conduct 3.7, a trial court is required to hold a hearing and make appropriate findings whenever an attorney remains as counsel after having been named as an adverse witness to his or her client.

The Colorado Supreme Court in a 5-2 decision reversed the Colorado Court of Appeals with directions to reinstate the judgment entered by the trial court. The majority in the Colorado Supreme Court opinion focused on the role of GROGAN's counsel in not withdrawing and held that they could not now avoid the consequences of their action. The Court went on to hold that Colorado Rule of Professional Conduct 3.7 did not require the trial court to conduct a hearing to determine whether disqualification was necessary.

GROGAN raised, in his Brief to the Colorado Court of Appeals and in the Colorado Supreme Court, the issue of the unfair prejudice which resulted from his counsel being called to the witness stand. His counsel were rigorously cross-examined and as a result of GROGAN's counsels' testimony, defendant was then permitted to put on her expert who testified that in his opinion, both of GROGAN's attorneys were negligent. Finally, the defendant repeatedly argued in her closing argument that the GROGAN's attorneys were negligent and that GROGAN's correct cause of action was against them and not against the defendant.

REASONS FOR GRANTING THE PETITION

At the heart of the Fifth and Fourteenth Amendments to the Constitution of the United States is the right of a civil litigant to be represented by counsel and to have a fundamentally fair trial, see Powell v. Alabama, 287 US 45, 77 L.Ed 158, 50 S.Ct. 55 (1932), Goldberg v. Kelly, 397 US 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970). As stated succinctly by the Colorado Court of Appeals in Grogan v. Taylor, 877 P.2d 1374, 1382 (Colo. App. 1993), ". . . the trial court's failure to disqualify GROGAN's attorneys severely prejudiced GROGAN and resulted in a trial that was fundamentally unfair to him." The right to counsel in civil litigation develops out of the principle that notice and

hearing are preliminary steps essential to the passing of an enforceable judgment and ". . . that they constitute basic elements of the constitutional requirement of due process of law.", Potashnick v. Port City Construction Company, 609 F.2d 1101, 1118 (1980).

This Court should review the Colorado Supreme Court's decision in order to correct a miscarriage of justice which resulted in GROGAN being deprived of his right to counsel in a constitutional sense and being deprived of his constitutional right to fundamentally fair trial.

I. THE RULING OF THE COLORADO SUPREME COURT IN PERMITTING THE DECISION OF THE TRIAL COURT TO STAND, DEPRIVES GROGAN OF HIS RIGHT TO COUNSEL.

As previously stated, there is ample and long standing authority for the proposition that the constitutional right to counsel exists both in civil, as well as criminal cases, Powell, supra. The opportunity to be heard is a fundamental requirement of due process of law, Grannis v. Ordean, 234 US 385, 58 L.Ed 1363, 34 S.Ct. 779 (1914). Where the action of the trial court impinges upon a party's due process right to retain counsel, such is a violation of a constitutional right and constitutes a ground for reversal of an adverse judgment in the case, Potashnick, supra at page 1119. Here, the action of the trial court, in failing and refusing to address the issue of disqualification and permitting expert testimony with respect to GROGAN's counsels' own negligence after permitting both counsel to be called as adverse witnesses after having determined that their testimony would be adverse to GROGAN, resulted in a significant inability of GROGAN's counsel to be the kind of advocates that could effectively discharge their duties and provide adequate counsel to GROGAN.

Colorado law in effect at the time of the trial, as set forth in Williams v. District Court, 700 P.2d 549 (Colo. 1985) by the Colorado Supreme Court, held that the act of subpoenaing counsel was, in itself, the functional equivalent of a motion to disqualify, Williams, supra. at page 555. The Colorado Supreme Court stated in Williams, at page 553:

"A lawyer who intermingles the functions of advocate and witness diminishes his effectiveness in both roles. . . The lawyer is placed in the unseemly position of arguing his own credibility to the jury. . . Obviously, a lawyer's duty to exercise independent judgment on behalf of his client, will be even more seriously jeopardized when the lawyer is called as a witness to give testimony adverse to his client."

Previous Colorado case law had held that a counsel could not act as both an advocate and give testimony adverse to the client's interests in the same proceeding, Reilly v. District Court, 181 Colo. 90, 507 P.2d 464 (1973).

If the constitutional right to counsel in a civil case is to have any meaning, it must necessarily encompass the idea that the role that counsel plays in the trial will meet certain minimum standards of conduct, not the least of which is a minimum amount of effectiveness for a party. Here, TAYLOR was, in essence, permitted to place GROGAN's attorneys on trial and transfer the focus of attention of the jury from the parties to the plaintiff's attorneys. As a result, GROGAN was deprived, in a constitutional sense, of his right to counsel.

II. THE CONDUCT OF THE TRIAL COURT IN PERMITTING A TRIAL TO OCCUR WITH GROGAN'S OWN COUNSEL TESTIFYING ON BEHALF OF THE DEFENSE AND PERMITTING THE DEFENSE TO ARGUE THE NEGLIGENCE OF HIS OWN COUNSEL DEPREVED HIM OF A FUNDAMENTALLY FAIR TRIAL.

While GROGAN concedes that his own counsel had a duty to withdraw once the trial court had made the necessary finding under Williams, supra, that the attorneys testimony would be adverse to him, their failure to withdraw, GROGAN submits, does not end the inquiry. The duty of a trial judge clearly encompasses the duty to take reasonable steps to ensure that a party has a fair trial. In fact, in the Colorado Code of Judicial Conduct, Canon 3A(10) the Colorado Supreme Court directed the trial judges of the State of Colorado as follows:

"A judge shall attempt, to the extent practicable, to make certain that lawyers in proceedings before the judge abide by their duties under the Colorado Rules of Professional Conduct. . ."

The trial court has been given supervisory authority to remedy conduct by which a party was prevented from having a fair trial, as set forth in Colorado Rules of Civil Procedure 59(c) and Colorado Rules of Civil Procedure 60(b). The primary responsibility of a court is the orderly administration of justice, People v. Schultheis, 638 P.2d 8 (Colo. 1981), Butin v. Rothman, 135 Colo. 477, 312 P.2d 783 (Colo. 1957), and to protect the rights of the rights of the litigants; Smith v. People, 8 Colo. 457, 8 P. 920 (Colo. 1885). This responsibility and inherent authority is to be carried out by disqualifying counsel whose conduct may imperil the ability of a litigant to receive a fair trial, Gold Rush Investments v. Ferrell, 778 P.2d 297 (Colo. App. 1989), People v. Garcia, 698 P.2d 801 (Colo. 1985).

The chilling effect that the improprieties of the trial court had on GROGAN's counsel's ability to adovcate his cause was made manifest by GROGAN's counsel at the beginning of closing argument, where he stated: "I am a little nervous, to be quite frank. I have never been accused of malpractice before, and it's - I feel like I am on trial as much as anything else in this case." (trial transcript, page 682).

As one commentator, {Sutton, The Testifying Advocate, 41 Tex.L.Rev. 477, 482-83 (1963)} has stated:

"In fairness to his client, a lawyer who will be a witness should not be converted into a more interested, and thus a less effective witness, by becoming an advocate as well.

Justice in our adversary system of litigation is dependant upon the partisanship of the advocate and the cross-examination of witnesses. The adversary system is at its best when each litigant is represented equally well by a skillful, partisan advocate who discovers and uses every witness and every scrap of evidence helpful to the client's cause, and to champions the client's position as strongly as possible under the evidence and the law. When the advocate has a choice between an interested and disinterested witness, other factors being equal, he selects the

disinterested witness; for by cross-examination the bias of the interested witness can be developed to the client's detriment in the eyes of the jury."

In this case, the Colorado Court of Appeals correctly recognized that an error had been committed by the trial court of a fundamental character affecting the reliability of the judgment itself and acted to prevent manifest injustice. GROGAN requests that this Court recognize these same factors by granting his Petition herein.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari be granted.

Respectfully Submitted,

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Counsel for Petitioner

November 22, 1995.

No. 95-_____

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♦

RONALD GROGAN,

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♦

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

♦

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November 22, 1995

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SUPREME COURT, STATE OF COLORADO

NO. 94SC143 June 30, 1995

LORELEI A. TAYLOR,
d/b/a ROCKY MOUNTAIN PLATEAU, Petitioner,
v.
RONALD GROGAN and THE STATE OF COLORADO Respondents.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT REVERSED AND CASE REMANDED WITH DIRECTIONS

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JUSTICE ERICKSON delivered the Opinion of the Court.
JUSTICE MULLARKEY dissents, and JUSTICE LOHR joins in the dissent.

We granted certiorari to review Grogan v. Taylor, 877 P.2d 1374 (Colo. App. 1993). [1] We reverse the court of appeals. The respondent, Ronald Grogan (plaintiff),[2] was injured by an explosion in his motor home on November 7, 1986. The plaintiff filed a complaint against the petitioner, Lorelei Taylor (defendant) alleging that she or her agent had negligently overfilled his propane tank. At the bifurcated trial, in which the statute of limitations issue was tried first, the defendant was permitted to call both of the plaintiff's attorneys as defense witnesses. The trial court applied a two-year statute of limitations to the jury's finding on when the plaintiff's claims accrued,

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[1]We granted certiorari to review the following issues:

1. Whether, in determining an issue within the exclusive jurisdiction of the supreme court, the court of appeals erred in ordering a new trial where the conflict of the plaintiffs' counsel acting as both witnesses and advocates came about as a result of the conduct of those attorneys.

2. Whether the court of appeals erred in ruling that, under Colorado Rule of Professional Conduct 3.7, a trial court is required to hold a hearing and make appropriate findings whenever an attorney remains as counsel after having been named as an adverse witness to his or her client.

[2]On June 3, 1991, Grogan amended his complaint to include the state of Colorado as a party plaintiff because the State had paid some of Grogan's medical bills. The State is a respondent in the present case. Throughout this opinion, Grogan will be referred to as the "plaintiff" and references to the State of Colorado will be to "State".

The trial court held that the State's claim was barred by the statute of limitations. The court of appeals concluded that the trial court erred in dismissing the State's claim because the statute of limitations did not apply against the State. The application of the statute of limitations to the State is not before us for review and we will not address it.

and concluded that the claims were time-barred. The court of appeals reversed, and ordered a new trial because the trial was fundamentally unfair to the plaintiff. A new trial would require the defendant to again defend against the plaintiff's claims even though the defendant was not responsible for any error. Accordingly, we reverse and remand this case to the court of appeals with directions to reinstate the judgment entered by the trial court in favor of the defendant.

I

On November 7, 1986, the plaintiff suffered severe burns as a result of a propane fire in his motor home. In late January 1987, the plaintiff retained counsel who filed a complaint against the manufacturers of the motor home and motor home chassis on October 28, 1988, in federal district court. The plaintiff dismissed his claims against the chassis manufacturer and amended his federal complaint on August 3, 1990, to add a claim against the defendant based on alleged negligent overfilling of the propane tank. In February 1991, the federal suit was dismissed because there was no diversity of citizenship.

On March 6, 1991, plaintiff's counsel filed a complaint against the defendant in state court. The defendant answered that the plaintiff's claims were barred by statute of limitations. During discovery, the defendant sought to depose both of the plaintiff's attorneys on the statute of limitations issue. The defendant attempted to determine whether counsel acted with reasonable diligence on behalf of the plaintiff between the date of the accident and the date the claims were filed against the defendant. Both of the plaintiff's attorneys were deposed and named as defense witnesses for trial after their motions for protective orders regarding their depositions were denied.

The trial was bifurcated and the statute of limitations issue was tried first. At the jury trial the defendant was permitted to call plaintiff's counsel as defense witnesses. Plaintiff's attorneys remained as counsel throughout the trial.[3]

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[3]Plaintiff's counsel were subsequently replaced by new counsel. Substitution of counsel was filed with this court on November 10, 1994.

The jury found that the plaintiff's claims accrued on January 21, 1987, the approximate date when the plaintiff retained counsel. The trial court applied a two-year statute of limitations to the jury's finding, concluded the plaintiff's claims were time-barred, dismissed the plaintiff's complaint, and entered judgment in favor of the defendant.

The court of appeals agreed with the trial court that the plaintiff's attorneys could testify as defense witnesses at trial. Grogan v. Taylor, 877 P.2d 1374, 1380 (Colo. App. 1993). However, because the trial court failed to disqualify plaintiff's counsel after they did not withdraw, the court of appeals concluded the trial was fundamentally unfair to the plaintiff and remanded for a new trial. Id. at 1380-82.

II

The court of appeals properly determined that DR 5-102(B) of the Code of Professional Responsibility governed the procedure for plaintiff's counsel when they anticipated they would be called as witnesses for the defense.[4] DR 5-102(B) provides:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness

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[4]This court has exclusive authority to regulate the practice of law in Colorado. Unauthorized Practice of Law Comm. v. Prog, 761 P.2d 1111,1115 (Colo. 1988). However, the "[a]application of the Code of Professional Responsibility is within a court's 'general supervisory authority to ensure fairness to all who bring their cause to the judiciary for resolution.'" Williams v. District Court, 700 P.2d 549, 553 (Colo. 1985) (quoting Greenebaum Mountain Mortgage Co. v. Pioneer Nat'l Title Ins. Co., 421 F. Supp. 1348, 1351 (D. Colo. 1976)). The professional standards for attorneys in the present case are governed by the Code of Professional Responsibility. The Colorado Rules of Professional Conduct, designed to replace the Code, were adopted after the trial and did not become effective until January 1, 1993.

> other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

In Williams v. District Court, 700 P.2d 549, 553 (Colo. 1985), we examined the ethical considerations that "necessarily arise when an attorney of record is subpoenaed by opposing counsel in order to testify against the subpoenaed attorney's client in a pending trial." We concluded that an attorney may subpoena opposing counsel to testify adversely to his client only after showing:

> (1) that [opposing counsel's] testimony will be actually adverse to [his or her client]; (2) that the evidence sought to be elicited from the lawyer will likely be admissible at trial under the controlling rules of evidence; and (3) that there is a compelling need for such evidence, which need cannot be satisfied by some other source.

Williams, 700 P.2d at 555-56 (footnotes omitted).[5]

The trial court found that all of the elements of the Williams test were satisfied. The court of appeals determined there was adequate support in the record for the trial court's findings and concluded the trial court did not err in denying the plaintiff's motion to quash the subpoenas served on his counsel or in allowing counsel to be called as defense witnesses at trial. Grogan, 877 P.2d at 1380.

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[5]Williams was a criminal case in which the prosecution subpoenaed the attorney of the accused as a prosecution witness. DR 5-102(B) was applicable to both civil and criminal cases. In our view, the Williams factors are equally applicable in the civil context.

A

The court of appeals stated the Williams analysis did not end its inquiry because the act of subpoenaing plaintiff's counsel constituted a motion to disqualify.[6] Because plaintiff's counsel did not withdraw as required under DR 5-102(B), the court of appeals determined that the trial court's failure to disqualify them was fundamentally unfair and required a new trial. Grogan, 877 P.2d at 1382. We disagree.

In a March 30, 1992, minute order, the trial court stated that "for purposes of trial, defendant may call [plaintiff's counsel] as witnesses for the limited purpose of the affirmative defense of the statute of limitations." In clarifying its March 30 minute order at a pretrial conference on March 31, 1992, the court stated that both of the

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[6]The court of appeals stated:

> Once the trial court made the necessary finding under Williams that the attorneys' testimony would be adverse to [the plaintiff], the lawyers were duty bound to withdraw under the Code of Professional Responsibility DR 5-102(B). And, upon their failure to do so, under Williams, the trial court was required to disqualify them from proceeding further on [the plaintiff's] behalf, unless they were able to show an exception to the ethical rules allowing them to continue.

Grogan, 877 P.2d at 1381. The court of appeals acknowledged that the trial court applied Williams, and that there was adequate support in the record for the trial court's findings. Grogan, 877 P.2d at 1380. We do not find support in Williams for the court of appeals conclusion that the trial court was required to disqualify the plaintiff's attorneys when they failed to disqualify themselves. Williams wet forth the criteria that must be met when an attorney seeks to subpoena opposing counsel to elicit testimony adverse to the opposing counsel's client Williams, 700 P.2d at 555. Williams did not set forth the criteria for disqualification of an attorney for violation of a disciplinary rule.

plaintiff's attorneys could be called by the defense to testify on the statute of limitations issue.

The preliminary statement to the Code of Professional Responsibility provides:

> The Code is designed both as an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standard stated in the Disciplinary Rules.
>
> . . . .
>
> The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct.

As the Preliminary Statement to the Code reflects, the Code is designed to provide ethical guidance to attorneys and places the responsibility for compliance on attorneys. DR 5-102(B) makes no provision for trial court disqualification of attorneys and does not require a new trial for noncompliance. The Code mandates that an attorney withdraw on his own initiative if he violates DR 5-102(B).

In determining when disqualification for violation of a disciplinary rule is appropriate,

> the mere violation of a disciplinary rule does not automatically result in disqualification. The critical question is whether the litigation can be conducted in fairness to all parties. disqualification should not be imposed unless the claimed misconduct in some way "taints" the trial or legal system.

Federal Deposit Inc. Co. v. Isham, 782 F. Supp. 524, 528 (D. Colo. 1992) (citations omitted). The defendant did not file a motion to disqualify plaintiff's counsel and counsel did not seek to disqualify

themselves at trial. The trial court specifically ruled plaintiff's counsel could testify. The defendant would be unfairly burdened if she were required to defend against the plaintiff's claims in new trial. Plaintiff's counsel were responsible for the position in which they placed themselves and cannot now avoid the consequences of their actions. See Caldwell v. Kats, 193 Colo. 384, 385, 567 P.2d 371, 372 (1977). The plaintiff was bound by the actions and decisions of his counsel. See Mountain State Tel. & Tel. Co. v. Department of Labor & Employment, 184 Colo. 334, 338, 520 P.2d 586, 589 (1974); Magliocco v. Olson, 762 P.2d 681, 685 (Colo. App. 1987); see also People in Interest of P.N., 663 P.2d 253, 256 (Colo. 1983). The court of appeals erred in granting the plaintiff a new trial.

B

Because it ordered a new trial, the court of appeals examined what would occur if the plaintiff's attorneys represented the plaintiff at a new trial and were called as witnesses by the defense. The court of appeals analyzed Colorado Rule of Professional Conduct 3.7, even though the Rules did not become effective in Colorado until after the trial. In concluding that Rule 3.7 requires trial courts to follow certain procedures in future cases in which attorneys are called as adverse witnesses by opposing counsel, the court of appeals stated:

> [T]he trial court must treat the act of subpoenaing counsel as "the functional equivalent of a motion to disqualify." Williams v. District Court, [700 P.2d 549, 555 (Colo. 1985)]. Thus, if an attorney remains as counsel after having been named as an adverse witness to his or her client, the trial court must conduct a hearing and make appropriate findings as to whether disqualification is required or whether any exception to the disciplinary rules would allow this to occur. That procedure must be followed even when the subpoenaed attorney-adverse witnesses have not moved to withdraw as counsel and the opposing party has not moved for and order disqualifying them.

Grogan, 877 P.2d at 1383. We disagree with the court of appeals.

Rule 3.7 of the Colorado Rules of Professional Conduct provides, in relevant part:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
> (3) disqualification of the lawyer would work substantial hardship on the client.

The court of appeals discussion of Rule 3.7 is dicta because its analysis of the Rule was not integral to its resolution of the issues before it. Neither Rule 3.7 nor the accompanying committee comment mandate a hearing when there is a possibility of a conflict of interest on the part of an attorney called as a witness. The court of appeals erred in stating that Rule 3.7 requires a hearing by the trial court to ascertain whether disqualification is necessary.

III

Accordingly, we reverse and remand this case to the court of appeals with directions to reinstate the judgment entered by the trial court in favor of the defendant.

JUSTICE MULLARKEY dissents, and JUSTICE LOHR joins in the dissent.

Lorelei A. Taylor, d/b/a Rocky Mountain Plateau v. Ronald Grogan and the State of Colorado, No. 94SC143

JUSTICE MULLARKEY dissenting:

I respectfully dissent.

The majority holds that a trial court is under no obligation to disqualify the plaintiff's counsel from representation when the defense calls the counsel as a witness. The majority concludes that the plaintiff's counsel should have withdrawn from representation under the applicable standards of professional responsibility. However, the majority states that "[plaintiff's counsel were responsible for the position in which they placed themselves and cannot now avoid the consequences of their action." Maj. op. at 8. Accordingly, the majority concludes that the trial court was under no obligation to disqualify plaintiff's counsel.

I agree that the conduct of the plaintiff's attorneys violated the Code of Professional Responsibility. However, I disagree with the majority's conclusion that the trial court was not obligated to disqualify the plaintiff's attorneys when such a conflict became apparent. Under our case law, the trial court was required to treat each subpoena as a motion to disqualify. It erred when it failed to do so and failed to disqualify the plaintiff's counsel.

The majority cites Williams v. District Court, 700 P.2d 549 (Colo. 1985) with approval in the present case. However, the majority ignores our express holding in Williams which is dispositive on the issue before us:

> Although the prosecution may not have taken the step of actually filing a formal motion to disqualify a defense attorney subpoenaed as a prosecution witness for trial, the act of subpoenaing defense counsel is itself, in our opinion, the functional equivalent of a motion to disqualify. "It is obvious that a lawyer cannot act as an advocate on behalf of his client, and yet give testimony adverse to the interests of that client in the same proceeding."

Id. at 555 (quoting Riley v. District Court, 181 Colo. 90, 95, 507 P.2d 464, 466 (1973)).[7] We specifically held that when opposing counsel is subpoenaed, a trial court should consider that act as "the functional equivalent of a motion to disqualify." Accordingly, the trial court should have considered the subpoena as a motion to disqualify and determined whether any conflict requiring disqualification was involved.[8]

The trial court correctly considered the following Williams factors in deciding whether an attorney may subpoena opposing counsel to testify adversely to his client: "(1) that [opposing counsel's] testimony will be actually adverse to [his or her client]; (2) that the evidence sought to be elicited from the lawyer will likely be admissible at trial under the controlling rules of evidence; and (3) that there is a compelling g need for such evidence, which need cannot be satisfied from some other source." Williams, 700 P.2d at 555-56 (footnotes omitted). The trial court ruled that defense counsel had met the Williams standard and that plaintiff's counsel would be required to testify.

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[7]I agree with the majority that although Williams was a criminal case, the Williams analysis is applicable in both civil and criminal contexts. Maj. op. at 6 n. 5.

[8]In a pretrial conference on March 31, 1992, the trial court was specifically asked by plaintiff's counsel if the court denied the motion to disqualify plaintiff's counsel. The court responded that it did not know if that was before the court and that its order said nothing about a motion to disqualify. Although the plaintiff's counsel made some assertions that the motion to subpoena was actually a motion to disqualify, some confusion exists as to whether the court actually believed that the motion to subpoena was also a motion to disqualify. Under Williams, the motion to subpoena was the functional equivalent of a motion to disqualify. Accordingly, if a subpoena is necessary and the motion is granted, the motion to disqualify must also be ruled upon and, in instance such as this, it must be granted.

The majority apparently agrees with the trial court's and the court of appeals' conclusion this issue, but it finds that the trial court's inquiry properly ended after it decided the testimony issue. Under my analysis, if the testimony is found to be necessary and the attorneys are to be subpoenaed, the court must proceed to consider whether to disqualify the plaintiff's attorneys from further representation, regardless of an express motion to disqualify. In most cases, a finding that the Williams factors are met will be dispositive of the disqualification issue. As we said in Williams, "[a} lawyer will rarely, if ever, be able to effectively serve as an advocate and give testimony adverse to his client in the same proceeding." 700 P.2d at 554.

I disagree with the majority's characterization of the Williams test in footnote 6. Maj. op. at 6-7. It is correct only in the most technical sense to say, as the majority does, that Williams "did not set forth the criteria for disqualification." Williams did not use that label. However, by equating a subpoena compelling the testimony of opposing counsel with a motion to disqualify, Williams must have intended that its three-factor test would apply to the implied motion to disqualify. I reach this conclusion because Williams cited three cases as authority for its test. Two are cases involving attempts to compel opposing counsel to testify and the third involves a motion to disqualify opposing counsel. Williams, 700 P.2d at 556. There simply is no basis in Williams to limit the test to the testimony issue.

As stated by the Arizona Supreme Court on a similar issue:

> We would like to believe an attorney who recognizes that he ought to be called as a witness would withdraw out of respect for the profession of which he is a member and the court of which he is an officer rather than out of fear of discipline. In any event, when the court is faced with an attorney who refuses to withdraw and insists on taking the stand, the court may in its discretion disallow the testimony, disqualify the attorney, or impose any other procedural safeguards necessary to preserve the integrity of the fact finding process. If the court finds the unethical considerations raised by such testimony constitute prejudice great enough to outweigh the probative value of otherwise relevant evidence, the testimony may be disallowed. Where the evidence is material, necessary for the just

> determination of the issues, and unavailable from other sources, the court may order and attorney's disqualification.

Cottonwood Estates v. Paradise Builders, 624 P.2d 296, 302 (1981) (citations omitted); see also Comden v. Superior Court, 20 Cal. 3d 906, 576 P.2d 971, 145 Cal. Rptr. 9 (1978).

The majority concludes that "the defendant would be unfairly burdened if she were required to defend against the plaintiff's claims in a new trial." Maj. op. at 8. I find this reasoning unpersuasive. First, virtually any issue raised on appeal carries the risk of retrial. Furthermore, there is no great hardship to the defendant because this case has not yet been tried on the merits. The only issue which has been tried on the merits. The only issue which has been tried was the statute of limitations issue. Upon concluding that the statute of limitations had run, the trial court dismissed the case without ever evaluating the merits.

Second, the defendant initiated this dispute by subpoenaing the Plaintiff's attorneys. They could, and should, have expressly sought to disqualify the plaintiff's attorneys, especially in light of the trial court's confusion over the issue. I find it hard to believe that when subpoenaing plaintiff's counsel, the defense counsel did not appreciate the possible problems inherent in their actions.

Finally, it is wrong to put the burden on the innocent client to insist that his attorneys withdraw because they have been subpoenaed to testify. We cannot expect lay persons to have the legal sophistication to identify and resolve a problem which apparently escaped the understanding of two sets of lawyers and the trial judge. The burden should be placed squarely on the trial court. If the attorneys do not adhere to the Code of Professional Responsibility, the court must act. Here, it did not.

Accordingly, I believe the trial court erred in not considering the motion to subpoena to be the functional equivalent of a motion to disqualify. I would hold that since the trial court held that the subpoenas should issue and knew that the scope of the testimony was potentially dispositive of the case, the trial court should have disqualified

the plaintiff's attorneys. I would affirm the judgment of the court of appeals.

JUSTICE LOHR joins in this dissent.

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SC143
CERTIORARI TO THE COLORADO COURT OF APPEALS, 92CA1298
DISTRICT COURT, GUNNISON COUNTY, 91CV11

ORDER OF THE COURT

LORELEI A. TAYLOR d/b/a ROCKY MOUNTAIN PLATEAU,

Petitioner,

v.

RONALD GROGAN and THE STATE OF COLORADO

Respondents.

Upon consideration of the petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 28, 1995.
Justice Lohr and Justice Mullarkey would grant the Petition.
Justice Kourlis does not participate.

cc: James M. Bruce
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John Randolph Torbet
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Honorable Thomas A. Goldsmith
c/o Honorable Robert A. Brown
Chief Judge
Gunnison Combined Court
Gunnison County Courthouse
200 East Virginia Avenue
Gunnison, CO 81230

Clerk of Gunnison Combined Court
Gunnison county Courthouse
200 East Virginia Avenue
Gunnison, CO 81230

Patrick H. Stanford, Clerk
Colorado Court of Appeals

COLORADO COURT OF APPEALS December 16, 1993
No. 92CA1298

Ronald Grogan and The State of Colorado,

Plaintiffs-Appellants and Cross-Appellees,

v.

Lorelei a. Taylor d/b/a Rocky Mountain plateau,

Defendant-Appellee and Cross-Appellant.

Appeal from the District Court of Gunnison County
Honorable Thomas A. Goldsmith, Judge
No. 91CV11

Division I
Opinion by JUDGE ROTHENBERG
Pierce and Criswell, JJ., concur

JUDGMENTS REVERSED
AND CAUSE REMANDED
WITH DIRECTIONS

LeHouillier & Associates, Patric J. LeHouillier, Joseph R. Winston, Colorado Springs, Colorado; Ronald A. Peterson, Colorado Springs, Colorado, for Plaintiffs-Appellants and Cross-Appellees

Quigley & Bruce, James M. Bruce, Bruce A. Logan, Denver, Colorado, for Defendant-Appellee and Cross-Appellant

Plaintiffs, Ronald Grogan and the State of Colorado, appeal the judgment entered in favor of defendant, Lorelei A. Taylor, d/b/a Rocky Mountain Plateau, dismissing plaintiffs' claims as barred by the statute of limitations. Defendant cross-appeals the trial court's orders denying her motions for summary judgment and for costs. We reverse and remand for a new trial.

This case involves injuries arising out of a propane gas explosion in a motor home.

On November 6, 1986, Grogan had the gasoline and propane tanks on his motor home filled at a gas station owned by defendant. Later that night, Grogan, who had been sleeping in the motor home, awoke and lit a cigarette. The motor home exploded into flames, and Grogan was seriously injured. Plaintiff State of Colorado paid for the medical expenses Grogan incurred as a result of his injuries.

In late January 1987, Grogan retained attorney Ronald Peterson to investigate any potential claims he might have. Peterson asked Patric LeHouillier to be co-counsel.

Peterson contacted Grogan's insurer, and, in March 1988, Peterson received the investigative reports made by the insurer's fire and explosion expert (Boh). According to those reports, the explosion was caused by the faulty design of the gasoline venting system and was aggravated by the presence of propane.

That same month, Peterson also obtained the investigative report made by the fire chief who had responded to the explosion. According to the fire chief's report, the explosion has been caused by propane.

In March 1988, Grogan's attorneys contacted another explosion expert (Harrison) to determine whether propane was a cause of the fire. In July, that expert told counsel he disagreed with the first expert. He believed propane played a major role in the explosion, but did not know what caused it.

Relying on the first expert's conclusion that the explosion was caused by faulty design of the gasoline venting system, Grogan filed an action on October 28, 1988, in federal district court against the

manufacturers of the motor home and the motor home chassis. Those defendants are not involved in this action.

In march 1989, Grogan's attorneys hired another fire and explosions expert (Romig) to examine and determine the cause of the fire. In October, that expert concluded that it was a propane explosion, but he did not know the cause.

In January 1990, Grogan met with Boh and another expert (Romig) to look at a motor home similar to the one that exploded. After looking at the motor home, Grogan told the two experts that on the night of the accident, he had purchased ten gallons of gasoline and ten gallons of propane. Based on Grogan's statement, the experts immediately concluded the explosion was caused by the overfilling of the propane tank, rather than a gasoline related cause.

As a result of the January 1990 information, Grogan dismissed his claim against the chassis manufacturer, and, on August 3, 1990, he amended his federal complaint to add a claim against defendant based upon an alleged negligent overfilling of the propane tank.

In February 1991, the federal action was dismissed because of lack of diversity of citizenship.

On March 6, 1991, Grogan filed this action in state court. In June 1991, the State of Colorado was added as a plaintiff; it merely seeks the medical expenses paid on Grogan's behalf.

In its answer, the defendant asserted the affirmative defense of statute of limitations.

During the discovery phase of the action, defendant sought to depose both of Grogan's attorneys on the statute of limitations issue, more specifically, on the issue of whether the attorneys acted with reasonable diligence on Grogan's behalf between the date of the accident and the date Grogan's claim was filed against defendant. Grogan's objection to the deposing of his attorneys was overruled, and both were deposed and named as defense witnesses for trial.

Thereafter, the statute of limitations issue was bifurcated and tried first. At the jury trial, again over Grogan's objection, the defendant was permitted to call both of Grogan's attorneys as defense witnesses. Both attorneys remained as counsel throughout the trial proceedings and continue to represent Grogan in this appeal.

Following a trial on the bifurcated issue, the jury found that plaintiffs' cause of action had accrued on January 21, 1987, the approximate date when plaintiff had retained attorney Peterson. The trial court, applying a two-year statute of limitations to the jury's finding, ruled that plaintiffs' claims were time-barred. Accordingly, it dismissed plaintiffs' complaint and entered judgment in favor of defendant.

I

We first address both plaintiffs' claim that the trial court erred in applying a two-year statute of limitations instead of the three-year statute of limitations set forth in the Colorado Automobile Accident Reparations Act, §10-4-701, et seq., C.R.S. (1987 Repl. Vol 4A) (the No-Fault Act). We disagree with plaintiffs' contention.

Generally, tort actions must be commenced within two years after the cause of action accrues. Section 13-80-102(1)(a), C.R.S. (1987 Repl. Vol. 9A). However, the General Assembly has created an exception for "[a]ll actions under the Colorado Auto Accident Reparations Act"; such actions must be commenced within three years after the cause of action accrues. Section 13-80-101(1)(j), C.R.S. (1987 Repl. Vol. 4A).

Here, the theory of Grogan's lawsuit was that defendant negligently overfilled his propane tank. It did not fall "under" the No-Fault Act because defendant was not an owner, user, or operator of plaintiff's vehicle. Thus, the trial court properly concluded that plaintiffs' action was subject to the two-year statute of limitations governing torts. See Jones v. Cox, 828 P.2d 218 (Colo. 1992); Boyer v. Ito Packing Co., 837 P.2d 773 (Colo. App. 1992) (plaintiff's action against defendant for negligent packing of the contents of a truck was a tort action to which a two-year statute of limitations applied).

II.

Plaintiffs next claim the trial court improperly instructed the jury on when a cause of action accrues. Again, we disagree.

A cause of action accrues on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence. Section 13-80-108(1), C.R.S. (1987 Repl. Vol. 6A) See Mastro v. Brodie, 682 P.2d 1162,1168 (Colo. 1984) ("[T]he statute of limitations begins to run when the claimant has knowledge of facts which would put a reasonable person on notice of the nature and extent of an injury and that the injury was caused by the wrongful conduct of another."). See also Jones v. Cox, Supra.

The form of the instructions given at trial is within the discretion of the trial court. Armentrout v. FMC Corp., 842 P.2d 175 (Colo.1992). Parties are entitled to an instruction embodying their theory of the case if there is evidence in the record to support it. Carter v. Lovelace, 844 P.2d 1288 (Colo. App. 1992).

At trial, the court instructed the jury as follows:

> Ronald Grogan's claims against the defendant Lorelei Taylor are deemed to accrue on the date that both his physical injuries and their cause were known or should have been know to him or his attorneys by the exercise of reasonable diligence. However, it is not necessary for the defendant to prove that Ronald Grogan or his attorneys knew the specific acts of the alleged negligence by this defendant or others or that they knew the details of the facts necessary to prove the claims against this defendant or others. It is enough that the plaintiff or his attorneys knew, or may be reasonably charged with knowledge of, sufficient facts to be aware that a claim existed more than two years before it was filed. (emphasis added)

Plaintiffs claim that there are two errors in this instruction: (1) the first sentence improperly imputes responsibility to plaintiffs' attorneys; and (2) the rest of the instruction is erroneous in that it should state that accrual occurs when a plaintiff discovered, or should have discovered, that his injuries were caused by defendant.

Here, the first sentence of the instruction tracks the language of §13-80-108(1). The additional language embodied defendant's theory which was the plaintiff's attorneys did not use reasonable diligence. We perceive no error in that sentence.

Nor do we find error in the last two sentences of the instruction. Although it could have been more specific, it adequately informed the jury the limitations period began to run against this defendant when the plaintiff or his attorneys had sufficient facts from which they reasonably could conclude Grogan's injury was caused by the wrongful conduct of another. See Mastro v. Brodie, supra.

III.

The next contention is made only by plaintiff State of Colorado. It asserts that the trial court erred in dismissing its claim based on the statute of limitations defense because the statute does not apply to the State of Colorado. Under these circumstances, we agree.

A statute of limitations does not run against a public entity unless the statute specifically or by necessary implication so provides. Berkeley Metropolitan District v. Poland, 705 P.2d 1004 (Colo. App. 1985).

Here, there is no specific provision that would make the two-year statute of limitations applicable to the state suing to recover medical benefits paid. In reaching this conclusion, we reject defendant's contention that Colorado Springs v. Timberlane Associates, 824 P.2d 776 (Colo. 1992) required a different result.

There, our supreme court held that statutes of limitation run against local governments except when the General Assembly expressly authorizes otherwise. The court did not address whether statutes of limitation run against the state.

Thus, we conclude the trial court erred in dismissing the State of Colorado's claim for medical benefits based upon defendant's statute of limitations defense, and, on remand, the court should reinstate the State's cause of action.

IV.

Plaintiff Grogan next contends the trial court erred in finding attorneys Peterson and LeHouillier were necessary witnesses and in allowing defendant to call them as witnesses at trial. He argues that the trial court's ruling was unfair to him because it placed his attorneys in the untenable position of being forced to supply testimony adverse to their client and in violation of certain ethical rules.

We disagree that the trial court erred in finding Grogan's attorneys were necessary witness or in allowing them to be called as defense witnesses at trial. However, we agree that the trial was fundamentally unfair to Grogan and that he is entitled to a new trial.

A.

Initially, we recognize that our supreme court has exclusive jurisdiction over attorney discipline matters and the interpretation of ethical rules governing their conduct. See C.R.C.P. 201 and 241. Nevertheless, we are unable to decide the issues raised by the parties in this appeal without considering the then-applicable portions of the Code of Professional Responsibility; the recently adopted Colorado Rules of Professional Conduct, which became effective January 1, 1993; and relevant supreme court decisions interpreting those ethical standards. See Gold Rush Investments v. Ferrell, 778 P.2d 297 (Colo. App. 1989).

In Williams v. District Court, 700 P.2d 549, 553 (Colo. 1985), our supreme court considered the myriad legal and ethical considerations that "necessarily arise when an attorney of record is subpoenaed by opposing counsel in order to testify against the subpoenaed attorney's client in a pending trial."

There the court discussed the Code of Professional Responsibility Canons 5 and 7, which required lawyers to exercise

independent professional judgment on behalf of a client and to represent their clients zealously within the bounds of the law. The court noted that:

> A lawyer who intermingles the functions of advocate and witness diminishes his effectiveness in both roles . . . [T]he lawyer is placed in the unseemly position of arguing his own credibility to the jury . . . Obviously, a lawyer's duty to exercise independent judgment on behalf of his client will be even more seriously jeopardized when the lawyer is called as a witness to give testimony adverse to his client.

Williams v. District Court, supra, 700 P.2d at 553 (original emphasis).

Code of Professional Responsibility DR 5-102(B), then in effect, was also "critical" to the court's analysis. That rule stated:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client. (emphasis added)

Ultimately, the Williams court concluded that an attorney may subpoena opposing counsel to testify adversely to his client but only after showing that: (1) opposing counsel's testimony will be actually adverse to his or her client; (2) the evidence sought to be elicited from the lawyer will likely be admissible at trial under the controlling rules of evidence; and (3) there is a compelling need for such evidence, which need cannot be satisfied by some other source.

Applying that guideline here, the trial court found that all of the required elements of the Williams test were satisfied and there is ample record support for that finding. First, Peterson's and LeHouillier's testimony had the potential to be adverse to Grogan's interest. And, in fact, the heart of the defense was that the attorneys had failed to exercise

reasonable diligence during the investigatory phase and thus had failed to file Grogan's lawsuit on time.

Secondly, the evidence sought to be elicited from Grogan's lawyers was highly relevant and likely to be admissible at trial. Third, the defense showed a compelling need for such evidence because only Peterson and LeHouillier had firsthand knowledge about the efforts made to investigate the case between the date they were retained and the date the case was filed against this defendant.

Thus, the trial court did not err in denying Grogan's motion to quash the subpoenas served on his attorneys, or in allowing the defendant to subpoena and call both attorneys as defense witnesses at trial.

B.

Defendant correctly notes that, although she subpoenaed and called Grogan's attorneys as defense witnesses at trial, she never moved to disqualify them as counsel. Nor did Peterson and LeHouillier ever move to withdraw as Grogan's counsel. Based upon these uncontested facts, therefore, defendant asserts that the trial court's correct resolution of the Williams issue ends our inquiry. We do not agree.

In Williams, supra, 700 P.2d at 555, the supreme court also stated:

> Although the prosecution may not have taken the step of actually filing a formal motion to disqualify a defense attorney subpoenaed as a prosecution witness for trial, the act of subpoenaing defense counsel is itself, in our opinion, the functional equivalent of a motion to disqualify. (emphasis added)

The court thus recognized that: "[A] lawyer will rarely, if ever, be able to effectively serve as an advocate and give testimony adverse to his client in the same proceeding." Williams v. District Court, supra, 700 P.2d at 554. See Riley v. District Court, 181 Colo. 90, 95, 507 P.2d 464, 466 (1973) ("It is obvious that a lawyer cannot act as an

advocate on behalf of his client, and yet give testimony adverse to the interests of that client in the same proceeding."). See also ABA Comm. on Ethics and Professional Responsibility, Formal Op. 339 (1975) (Any doubt that the lawyer has about the answer to the ethical question, whether it arises when employment is tendered or after representation has been undertaken, should be resolved in favor of the lawyer's testifying and against his becoming or continuing as counsel).

Thus, it is irrelevant that defendant did not formally attempt to disqualify Peterson and LeHouillier, that defendant had no duty to request their withdrawal, or that the two attorneys themselves did not move to withdraw. The defendant's act of successfully subpoenaing those attorneys to testify against their client constituted a motion to disqualify. Williams v. District Court, supra, 700 P.2d at 554. ("Indeed, the use of the subpoena power solely as a contrivance to disqualify opposing counsel could itself constitute unprofessional conduct prejudicial to the administration of justice in violation of [Code of Professional Responsibility] DR 1-102(A)(5).").

Once the trial court made the necessary finding under Williams that the attorneys' testimony would be adverse to Grogan, the lawyers were duty bound to withdraw under Code of Professional Responsibility DR 5-102(B). And, upon their failure to do so, under Williams, the trial court was required to disqualify them from proceeding further on Grogan's behalf, unless they were able to show an exception to the ethical rules allowing them to continue. See Murphy v. People, ___ P.2d ____, (Colo. No. 92SC426, November 15, 1993) ("[W]e also seriously question . . . the failure of appointed counsel to file a motion to withdraw from the case . . . ; a lawyer shall withdraw from the representation of a client if the representation will result in violation of the rules of professional conduct. . . .").

The opening brief filed by the attorneys for Grogan states the reason for their failure to withdraw as follows:

> The plaintiff considered having both Peterson and LeHouillier withdraw, however, due to the complexity of the case and the additional costs and delay associated with such a course, the option was too onerous. See DR 5-101(B)(4).

Counsel's reliance on Code of Professional Responsibility DR 5-101(B)(4) is misplaced. That rule allowed counsel to remain in a case with the consent of his client after full disclosure if withdrawal "would work a substantial hardship on the client because of the distinctive value of the lawyer or his firms as counsel in the particular case." However, the exceptions contained in that rule applied only if the lawyer was being called as a witness on behalf of his client. See Code of Professional Responsibility DR 5-102(A).

Here, the lawyers were being called as adverse witnesses to Grogan and the critical rule was Code of Professional Responsibility DR 5-102(B). That rule contained no such exceptions and did not allow a lawyer-adverse witness to remain as counsel, even after full disclosure and even with the client's consent. In other words, under Code of Professional Responsibility DR 5-102(B), if a lawyer was called as a witness "other than on behalf of his client," once it became "apparent that [the lawyer's] testimony [was] or may [have been] prejudicial to his client," the lawyer was required to withdraw. Such was the case here. See Murphy v. People, supra.

Accordingly, we conclude that the trial court erred in not disqualifying Grogan's attorneys once it became apparent they would be called to testify adversely to Grogan.

Nor can this error be viewed as harmless. In fact, the degree of prejudice to Grogan and the tactical advantage received by the defendant from having these attorneys remain in dual roles as Grogan's attorneys and as key defense witnesses is apparent from defense counsel's closing argument:

> I want to be perfectly clear: Nobody is blaming Mr. Grogan for the late filing of this lawsuit against [the defendant]. No one is claiming he violated the statute of limitations. He didn't violate it; his attorneys did.
>
> You think that because you come back and you find that the statute of limitations has been violated and that Mr. Grogan's claim

> or claims against [the defendant] have to be dismissed . . . don't think that Mr. Grogan's (sic) being punished . . . . He still has a cause of action against his attorneys. They blew the statute. They committed malpractice. That's where his remedy lies. (emphasis added)

Although it is impossible to predict whether the outcome of the statute of limitations portion of the trial would have been different if Grogan had been represented by independent counsel, it is apparent that by intermingling the functions of advocate and witness, these lawyers' effectiveness in both roles was diminished. They were placed "in the unseemly position of arguing [their] own credibility to the jury." Williams v. District Court, supra, 700 P.2d at 553. And, given their multiple conflicting roles, their ability to exercise independent judgment on Grogan's behalf was seriously jeopardized. For example, their effectiveness in making strategic judgments was impaired because they had to decide when and whether to object to the defendant's evidence of, and arguments about, their own conduct.

Finally, because it can be inferred that the jury necessarily rejected the testimony of these attorneys in reaching their verdict, it is reasonable to infer that their credibility with the jury as Grogan's advocates also was damaged. As one legal commentator has stated:

> [I]n fairness to his client, a lawyer who will be a witness should not be converted into a more interested and thus a less effective witness by becoming an advocate as well.
>
> [J]ustice in our adversary system of litigation is dependent upon the partisanship of the advocate and the cross-examination of witnesses. The adversary system is at its best when each litigant is represented equally well by a skillful, partisan advocate who discovers and uses every witness and every scrap of evidence and the

> law. When the advocate has a choice between an interested and a disinterested witness, other factors being equal, he selects the disinterested witness; for by cross-examination the bias of the interested witness can be developed, to the client's detriment in the eyes of the jury. (emphasis added)

Sutton, The Testifying Advocate, 41 Tex. L. Rev. 477, 482-83 (1963).

For these reasons, we conclude that the trial court's failure to disqualify Grogan's attorneys severely prejudiced Grogan and resulted in a trial that was fundamentally unfair to him. Thus, the judgment must be reversed and a new trial granted. See C.A.R. 1(d); Mt. Emmons Mining Co. v. Town of Crested Butte, 690 P.2d 231, 238 (Colo. 1984) (appellate court may notice errors appearing in the record, "especially when these errors are of a fundamental character affecting the reliability of the judgment itself."). See also Blueflame Gas, Inc. v. Van Hoose, 679 P.2d 579, 587 (Colo. 1984) (court addressed issue on its own motion "to prevent a manifest injustice to a litigant and to assure an appellate resolution of a controversy in accordance with correct principles of law") cf. 4 C. Wright & A. Miller, Federal Practice & Procedure §2558 (1971) (appellate court may reverse for plain error not objected to when necessary to prevent a miscarriage of justice).

C.

Since a new trial is necessary, we also must consider the applicability of the Colorado Rules of Professional Conduct to this case. As previously noted, those rules were adopted by our supreme court after this trial and became effective January 1, 1993. Certain of those rules differ from the Code of Professional Responsibility which previously governed this case.

Colorado Rules of Professional Conduct Rule 3.7 now addresses the same subject matter previously discussed in Canons 5 and 7, and DR 5-102; that is, when a lawyer may act as a witness. Rule 3.7 no longer specifically distinguishes between lawyers who testify on behalf of and adversely to their clients. Rather, it now states:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: . . .
> (3) disqualification of the lawyer would work substantial hardship on the client.
> (emphasis added)

Thus, the requirements of new Colorado Rules of Professional Conduct Rule 3.7 do not appear to be as stringent as the absolute prohibition contained in Code of Professional Responsibility DR 5-102(B).

The comment to this rule also recognizes that the combination of roles, i.e., advocate and witness, may create an incurable conflict of interest which cannot be waived. That issue must be determined by Colorado Rules of Professional Conduct Rule 1.7.

Colorado Rules of Professional Conduct Rule 1.7, the new general conflict of interest rule, states that:

> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by . . . the lawyer's own interest, unless:
>
> . . . .
>
> (2) the client consents after consultation.
>
> . . . .
>
> (c) For the purposes of this Rule, a client's consent cannot be validly obtained in those instances in which a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances of the particular situation. (emphasis added)

Here, since the thrust of the defense is that attorneys Peterson and LeHouillier allowed the statute of limitation to run, they clearly

remain adverse witnesses to their client. And, presumably, if indeed the jury on remand again finds the statute of limitations has run because f their failure to exercise reasonable care, as was urged by defense counsel in his closing argument, Grogan may have an action against his own counsel. Under these circumstances, it is inconceivable that a disinterested lawyer would conclude that Grogan should agree to their continued representation.

Accordingly, we hold that, under Colorado Rules of Professional Conduct Rule 1.7, the conflict of interest between Grogan and his attorneys is not waivable and that Grogan's consent to continued representation by these attorneys in this proceeding cannot be validly obtained.

In summary, we interpret Colorado Rules of Professional Conduct 3.7 to require that trial courts follow certain procedures in future cases in which the court, under Williams, permits one party to call the opposing party's attorney as an adverse witness against his or her own client.

In such cases, the trial court must treat the act of subpoenaing counsel as "the functional equivalent of a motion to disqualify." Williams v. District Court, supra. Thus, if an attorney remains as counsel after having been named as an adverse witness to his or her client, the trial court must conduct a hearing and make appropriate findings as to whether disqualification is required or whether any exception to the disciplinary rules would allow this to occur. That procedure must be followed even when the subpoenaed attorney-adverse witnesses have not moved to withdraw as counsel and the opposing party ha not moved for an order disqualifying them.

Here, in view of our resolution of the conflict issue and our conclusion that disqualification of the attorneys is required, we do not reach the issue of whether the requirements of the new "substantial hardship" exception of Rule 3.7 could be met in this case. Cf. Warrilow v. Norrell, 791 S.W.2d 515 (Tex. Civ. App. 1989).

V.

Since other issues raised may recur on retrial, we address them here.

Plaintiffs claim the trial court erred in several evidentiary rulings.

A.

Plaintiffs contend the court abused its discretion in allowing defendant's expert witness to explain to the jury what a statute of limitation is and to testify about when a cause of action accrues. Plaintiffs argue this testimony improperly invaded the province of the trial court as the giver of law. We agree.

Expert testimony is admissible if it is based upon special knowledge that will assist the jurors in understanding the facts and determining the issues. People in re Martinez, 841 P.2d 383 (Colo. App. 1992). "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." CRE 704. See also Daubert v. Merril Dow Pharmaceuticals, Inc., ____ U.S. ____, 113 S.Ct. 2786, ____ L.Ed.2d ____ (1993) (an expert witness is permitted wide latitude to offer opinions).

The trial court has broad discretion to determine the admissibility of expert testimony. And, absent an abuse of that discretion, the trial court's admission of such evidence will not be disturbed on review. People in re Martinez, supra. We also recognize that there can be a fine line between impermissible expert testimony about legal issues and permissible expert testimony about a standard of care of an expert's conclusion based upon mixed questions of facts and law; for example, insanity or competency. Nevertheless, it is within the province of the trial court and not the expert witnesses to tell the jury what the law is. See Specht v. Jensen, 853 F.2d 805 (10th Cir. 1988).

Here, defendant's expert witness, an attorney, explained what a statute of limitations is, and its purpose. However, he also went on to testify that a tort action:

> [B]egins to accrue when a party knows or should have known by the exercise of reasonable diligence that they had suffered injury or that the cause of the injury was the conduct or a wrongdoing of someone who violates civil law. Injury, in the sense that it's used and interpreted by our supreme court, injury means both the physical and mental injury and the legal injury which is caused by the wrongful conduct of someone else.

Thus, the expert witness' testimony did more than merely aid the jury in understanding what a statute of limitations is, and what "accrual" means. It invaded the province of the court as the giver of law. As the Court of Appeals for the Tenth Circuit stated:

> When an attorney is allowed to usurp [the trial court's] function, harm is manifested in at least two ways. First . . . the jury may believe the attorney-witness . . . is more knowledgeable than the judge in a given area of the law . . . . Second, testimony on ultimate issues of law by the legal expert is inadmissible because it is detrimental to the trial process. If one side is allowed the right to call an attorney to define and apply the law, one can reasonably expect the other side to do the same . . . . It can be expected that both legal experts will differ over the principles applicable to the case. The potential is great that jurors will be confused by these differing opinions, and that confusion may be compounded by different instructions given by the court.

Specht v. Jensen, supra, 853 F.2d at 809.

Accordingly, on retrial, the trial court should instruct the jurors to base their verdict on the law as given by the court, and should instruct them as to what the law is. It should not allow either party's

expert to do so. Compare Specht v. Jensen, supra, with Hines v. Denver & Rio Grande Western R.R. Co., 829 P.2d 419 (Colo. App. 1991) (court did not err in allowing expert witness to express opinion that plaintiff's conduct was negligent).

B.

Plaintiffs next claim the court erred in allowing into evidence testimony concerning Grogan's alcohol consumption on the day of the accident. Plaintiffs contend such testimony was irrelevant and prejudicial.

Evidence is relevant it tends to make the existence of a material fact more or less probable than it would be without the evidence. Quigley v. Jobe, 851 P.2d 236 (Colo. App. 1992).

The determination of whether proffered evidence is relevant is within the sound discretion of the trial court, and an abuse of that discretion will be found only when such determination is manifestly arbitrary or unreasonable. See Boettcher & Co. v. Munson, 854 P.2d 199 (Colo. 1993).

At trial, defendant introduced testimony concerning Grogan's alcohol consumption to show that it impaired his ability to remember the events leading up to the explosion. According to defendant, Grogan's attorneys should not have relied exclusively upon Grogan's memory and their decision to do so evidenced their lack of reasonable diligence.

We conclude the evidence was arguably relevant, provided that defendant can lay a proper foundation, that is, if defendant can show a reasonable basis for concluding the amount of alcohol allegedly consumed by Grogan was likely to have caused an impairment of his memory.

We also note that, here, the court instructed the jury to consider evidence of Grogan's alcohol consumption only as it relates to his memory of the events. if evidence of alcohol is admitted upon retrial, the court should give a similar limiting instruction.

IV.

CROSS-APPEAL

Defendant claims on cross-appeal that the trial court erred in denying her motion for summary judgment. However, the denial of a motion for summary judgment may not be considered on appeal after final judgment. See Manuel v. Fort Collins Newspapers, Inc., 631 P.2d 1114 (Colo. 1981); Askew v. Gerace, 851 P.2d 199 (Colo. App. 1992).

The judgments entered in favor of defendant, Lorelei A. Taylor, d/b/a Rocky mountain plateau, and against plaintiffs Ronald Grogan and the State of Colorado are reversed, and the cause is remanded for a new trial and with directions to the trial court to disqualify plaintiffs' counsel.

JUDGE PIERCE AND JUDGE CRISWELL concur.

Supreme Court, U.S.
FILED
DEC 21 1995
CLERK

No. 95-825

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

RONALD GROGAN,

Petitioner,

vs.

LORELEI A. TAYLOR, d/b/a
ROCKY MOUNTAIN PLATEAU

Respondent.

Response to Petition for Writ of Certiorari
To the Colorado Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 22, 1995

QUESTION PRESENTED

Does the ineffective assistance of retained counsel in a civil action between private litigants have any constitutional implications?

PARTIES

The parties to this action are Petitioner, RONALD GROGAN, and Respondent, LORELEI A. TAYLOR, d/b/a ROCKY MOUNTAIN PLATEAU, LORELEI A. TAYLOR is now known as LORELEI SUTHERLAND. THE STATE OF COLORADO is a party in a related underlying action but has no interest in the petition brought by RONALD GROGAN to this Court.

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OPINIONS DELIVERED BELOW

The opinion from which Ronald Grogan has filed the Petition for Writ of Certiorari to the United States Supreme Court was issued by the Colorado Supreme Court at *Taylor v. Grogan,* 900 P.2d 60 (Colo. 1995). The underlying opinion of the Colorado Court of Appeals is reported at *Grogan v. Taylor,* 877 P.2d 1374 (Colo. App. 1993). The text of these opinions are included as appendices to Ronald Grogan's Petition for Writ of Certiorari and will not be included in this response.

JURISDICTION

Lorelei Taylor admits the jurisdiction of this Court, pursuant to 28 U.S.C. §1257(a) and that Ronald Grogan has filed a timely Petition for a Writ of Certiorari to this Court.

STATEMENT OF STATUTES, CONSTITUTIONAL PROVISIONS AND RULES

Ronald Grogan has invoked the Fifth and Fourteenth Amendments of the United States Constitution in this case. Contrary to this assertion, Lorelei Taylor believes that this case turns only upon the application of the Colorado Code of Professional Responsibility D.R. 5-102(B) which provides as follows:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

STATEMENT OF THE CASE

Lorelei Taylor believes that the following additional facts and circumstances of this case need to be explained to fully understand the controversy raised by Ronald Grogan. The trial

court in this case correctly ruled that Taylor would be entitled to the testimony of both of Ronald Grogan's attorneys, Patric LeHouillier and Ron Peterson, on the issue of statute of limitations. As a result of this ruling, LeHouillier and Peterson had a conflict of interest with their client, Ronald Grogan, pursuant to the Colorado Code of Professional Responsibility D.R. 5-102(B). It was the choice of the Plaintiff, Ronald Grogan, and his attorneys, Patric LeHouillier and Ronald Peterson, to proceed with the statute of limitations trial acting as both advocates and witnesses. See *Grogan v. Taylor* at 1381.

Attorneys LeHouillier and Peterson maintained representation on this case throughout the jury trial and the Court of Appeals level and did not withdraw until certiorari was granted by the Colorado Supreme Court. See *Taylor v. Grogan* at 61 n. 3. This case arises not because of the failure of the trial court to act but the failure of the Ronald Grogan's attorneys to withdraw as required by the Code of Professional Responsibility of the State of Colorado, resulting in their ineffective assistance of counsel to Ronald Grogan.

SUMMARY OF ARGUMENT

The essence of Ronald Grogan's Petition for Writ of Certiorari is contained in the following statement on page 6 of his Petition which states as follows:

> If the constitutional right to counsel in a civil case is to have any meaning, it must necessarily encompass the idea that the role that counsel plays in the trial will meet certain minimum standards of conduct, not the least of which is a minimum amount of effectiveness for a party.

This argument is contrary to case law directly on point. While there is a right to representation of counsel in a civil action, there is no constitutional or statutory right to effective assistance of counsel in a civil case. A party does not have any right to a new trial in a civil suit because of inadequate counsel — the remedy is a suit against the attorneys for malpractice.

An aggrieved party in a civil case involving only private litigants, unlike a defendant in a criminal case, does not have a constitutional right to effective assistance of counsel. The remedy in a civil case, in which chosen counsel is negligent, is an action for malpractice. The constitutional right to effective assistance of counsel has not been extended to any civil proceedings.

ARGUMENT

Ronald Grogan and his counsel have argued that the actions of the trial court prohibited him from representation of counsel and thus resulted in a fundamentally unfair trial contrary to his Fifth and Fourteenth Amendment rights of the United States Constitution. These arguments are wholly without merit and ignore extensive and persuasive case law to the contrary.

A. THE CONSTITUTIONAL RIGHT TO REPRESENTATION OF COUNSEL IN A CIVIL CASE DOES NOT EXTEND TO EFFECTIVE REPRESENTATION BY RETAINED COUNSEL.

In this case, the conflict between Ronald Grogan and his attorneys, Patric Lehouillier and Ronald Peterson, arose as a result of provisions of the Colorado Code of Professional Responsibility D.R. 5-102(B) which requires an attorney that would be testifying contrary to his own client's interest to withdraw. The Code of Professional Responsibility establishes the duties and responsibilities between an attorney and his client. *Taylor v. Grogan,* at 63. It establishes no duty upon the trial court to enforce or intercede in the attorney-client relationship. There is also no duty on opposing counsel to interject themselves into this area. The only existing duty to act, by withdrawing, was that of LeHouillier and Peterson when the conflict arose. Both the Colorado Court of Appeals and the Colorado Supreme Court found that the trial court properly ruled that LeHouillier and Peterson were necessary witnesses for the Defendant, Lorelei Taylor, in her statute of limitations defense. See *Grogan v. Taylor* at 1380 and *Taylor v. Grogan* at 62. Once this ruling was made, the

duty to withdraw was incumbent upon these counsel. Even Mr. Grogan concedes this issue. See Grogan's Petition at page 6.

Nearly identical circumstances were addressed in *Deppe v. Tripp*, 863 F.2d 1356, 1365 (7th Cir. 1988), where both defendant appellants voluntarily agreed to representation by the same trial counsel. Each of these defendant appellants clearly possessed the financial resources to secure separate trial counsel had they so desired and actually did so on appeal. They raised the argument that this conflict led to ineffective assistance of counsel and, therefore, their constitutional rights had been impinged. The Seventh Circuit Court of Appeals ruled that where privately retained counsel performs inadequately, including circumstances where they represent two or more parties notwithstanding a conflict of interest, the proper remedy is not a new trial but rather an action against the attorney for malpractice.[1] The court observed that nothing in that action warranted imposing upon the other side the burden of a new trial due to the alleged conflict arising from the joint representation of two of the civil co-defendants. The court in addition found that the conflict of interest and duty belonged to the attorneys and their clients and that there was no duty for either the court or the opposing counsel to oppose or raise the purported conflict of interest. *Deppe, Supra.*

While Ronald Grogan correctly asserts that there is a limited constitutional right to representation of counsel in a civil case, the scope of that constitutional protection must be distinguished from the broad protections of the right to counsel of criminal defendants, which includes effective assistance of counsel under the Sixth Amendment.

In *Allen v. Barnes*, 721 F.2d 643 (8th Cir. 1983), the court found that the Petitioner had no right to a court appointed attorney, and therefore, it followed that he was not entitled to a new trial any more than a litigant with retained counsel would be in the event of attorney incompetence.

---

[1] Counsel was alleged to be in violation of Disciplinary Rule 5-105 of the Code of Professional Responsibility.

This rule was similarly applied by the same court in *Glick v. Henderson,* 855 F.2d 536, 541 (8th Cir. 1988), where it observed that in a civil case there was no constitutional or statutory right for a person to have counsel appointed in a civil case, and it therefore followed that there is no constitutional or statutory right to effective assistance of counsel in a civil case. They expressly ruled that Glick's remedy for any ineffective assistance of appointed counsel was a suit against his attorney for malpractice, not a new trial -- the same remedy which he would have been entitled to in a civil case with a private attorney.

In *Keene Corp. v. Cass,* 908 F.2d 293 (8th Cir. 1990) the same rule was followed in a §1983 civil rights action, ruling that not even in a civil rights action was there a constitutional right to effective assistance of counsel.

In *MacCuish v. U.S.,* 844 F.2d 733, 735 (10th Cir. 1988), a medical malpractice case was brought against the United States government and its employee doctor. The plaintiffs argued that their retained civil counsel had ineffectively and incompetently handled the case. They, therefore, requested a new trial. In arriving at their decision, the court observed that the plaintiff confused her civil case with that of a Sixth Amendment based claim for a retrial of a criminal case. The court held that the Sixth Amendment right to effective assistance of counsel does not apply to civil litigation.

They reasoned that there is no constitutional or statutory right to effective assistance of counsel on a civil case. A party does not have any right to a new trial in a civil suit because of inadequate counsel that has as its remedy a suit against the attorneys for malpractice. In justifying this rule, the court observed that an aggrieved party with retained private counsel, unlike a defendant in a criminal case, does not have a constitutional right to effective assistance of counsel. The remedy in a civil case in which chosen counsel is negligent is an action for malpractice. The right to effective assistance of counsel has not been extended to any civil proceeding. Any incompetence or ineffectiveness of counsel does not provide a basis for a new trial on the merits of an underlying

claim, but rather for a malpractice action arising out of the negligent conduct of the attorney. *MacCuish* at 735.

In *Luera v. Snyder*, 599 F.Supp. 1459, 1465 (D. Colo. 1984), the court compared and contrasted the scope of constitutional protection extended to criminal defendants and civil litigants. The court compared the interest as follows:

> Although the conviction of a criminal defendant who has not had effective assistance of counsel is repugnant to the constitution, the civil litigant has no such constitutional bedding.
>
> A new trial is not warranted based upon the attorney's poor handling of the case. The Plaintiffs having voluntarily chosen these attorneys as their representative in the action cannot now avoid the consequences of the acts or omissions of this freely selected agent.
>
> Any other notion would be wholly inconsistent with our system of representative litigation in which each party is deemed bound by the acts of his lawyer agent and is considered to have notice of all facts, notice of which can be charged to the attorney.

The above has been the position of Lorelei Taylor throughout this litigation and at trial on the merits of this case. See *Grogan v. Taylor* at 1382.

There is absolutely no doubt that the circumstances under which Ronald Grogan went into this trial was based on the overt and conscious decision of Mr. Grogan and his attorneys, LeHouillier and Peterson. See *Grogan v. Taylor* at 1381. Any harm to Mr. Grogan arose from the failure of LeHouillier and Peterson to meet the ethical duty owed to their client. It was not the duty of the trial court nor opposing counsel to act in the absence of their failure to act.

The trial court in this case did not deprive Ronald Grogan of representation of counsel. He had representation of counsel.

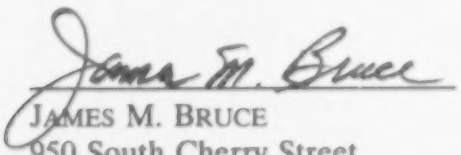
There was clearly ineffective assistance of counsel to Ronald Grogan from Patric LeHouillier and Ronald Peterson, but that has no constitutional implications. Ronald Grogan's remedy does not lie with the United States Supreme Court but in a malpractice action against his former attorneys.

CONCLUSION

Lorelei Taylor would ask that Ronald Grogan's Petition for Writ of Certiorari be denied and that this case be remanded to the State of Colorado for handling pursuant to the Order of the Colorado Supreme Court in *Taylor v. Grogan,* 900 P.2d 60 (Colo. 1995), and for what other and further relief as this Honorable Court may deem just and proper under the circumstances.

Respectfully Submitted,

QUIGLEY & BRUCE



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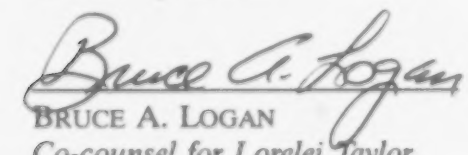

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